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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

AMERICAN COMMUNICATIONS  
SERVICES, INC.

Petition for Expedited Declaratory  
Ruling Preempting Arkansas Public  
Service Commission Pursuant to Section  
252(e)(5) of the Communications Act  
of 1934, as amended

CC Docket No. 97-100

To: The Commission

COMMENTS OF THE  
NORTHERN ARKANSAS TELEPHONE COMPANY

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## **TABLE OF CONTENTS**

### **Page No.**

<b>SUMMARY</b> . . . . .	<b>ii</b>
<b>COMMENTS OF NORTHERN ARKANSAS TELEPHONE COMPANY</b> . . . . .	<b>1</b>
Statement Of Interest . . . . .	2
The Arkansas Act Is Consistent With The Provisions Of The 1996 Act Regarding Arbitration And Approval Of Interconnection Agreements . . . . .	3
The Arkansas Act Is Consistent With The Provisions Of The 1996 Act Regarding Qualification For Universal Service Support . . . . .	5
The Legal Prerequisites For Preemption Are Not Satisfied . . . . .	6
Section 252(e)(5) Of The 1996 Act Does Not Authorize The Broad Preemption Sought By ACSI . . . . .	8
Section 253(d) of the 1996 Act Does Not Authorize The Preemption Sought By ACSI . . . . .	9
Section 2(b) Of The Communications Act Precludes The Preemption Sought By ACSI . . . . .	10
The Tenth Amendment To The U.S. Constitution Precludes The Preemption Sought By ACSI . . . . .	11
<b>CONCLUSION</b> . . . . .	<b>13</b>

## **SUMMARY**

Northern Arkansas Telephone Company (NATCO) opposes the Petition for Declaratory Ruling Preempting Arkansas Public Service Commission (Arkansas PSC) submitted by American Communications Services, Inc. (ACSI). ACSI's Petition should be denied for the following reasons: (1) the Arkansas Telecommunications Regulatory Reform Act (the Arkansas Act) is consistent with the provisions of the federal Telecommunications Act of 1996 (the 1996 Act) regarding arbitration and approval of interconnection agreements; (2) the Arkansas Act is consistent with the provisions of the 1996 Act regarding qualification for universal service support; (3) the legal prerequisites for preemption are not satisfied; (4) Section 252(e)(5) of the 1996 Act does not authorize the broad preemption sought by ACSI; (6) Section 253(d) of the 1996 Act does not authorize the preemption sought by ACSI; (7) Section (2)(b) of the Communications Act precludes the preemption sought by ACSI; and (8) the Tenth Amendment to the U.S. Constitution precludes the preemption sought by ACSI.

The Commission should find the Arkansas Act is consistent with the provisions of the 1996 Act regarding arbitration and approval of interconnection agreements. The statutory provisions ACSI relied upon do not make the case for federal preemption. Rather, the relevant sections of Arkansas law clearly demonstrate that the law is consistent on its face with the 1996 Act, and constitute a proper exercise of discretion within the parameters of the 1996 Act.

The Commission should also find the Arkansas Act is consistent with the provisions of the 1996 Act regarding qualification for universal service support. The statutory provisions ACSI selected from the Arkansas Act demonstrate that the Arkansas Act's intrastate universal service provisions not only are "not inconsistent" with the 1996 Act, but squarely comport with it.

Additionally, ACSI has not shown that circumstances exist such that the Commission, acting within the scope of congressionally-delegated authority, may preempt state regulation. Specifically, ACSI has not shown that the prerequisite circumstances for preemption, as

mandated by Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369 (1986), have been satisfied. The Commission should find that none of these circumstances are applicable to ACSI's petition, and thus the Arkansas PSC should not be preempted.

Furthermore, the Commission should find that Section 252(e)(5) of the 1996 Act does not authorize the broad preemption sought by ACSI. The plain language of Section 252(e)(5), whether read by itself or in the context of the entire Section 252(e), leaves no doubt but that Congress intended to limit the Commission's Section 252 preemption power to **individual** state commission proceedings regarding the arbitration and approval of interconnection agreements.

Similarly, the Commission should conclude Section 253(d) of the 1996 Act does not authorize the preemption sought by ACSI. The Arkansas General Assembly's determination that the Arkansas PSC shall arbitrate and approve interconnection agreements in accordance with federal law, but not impose additional state requirements upon incumbent LECs, is not a "legal requirement" barring entry into Arkansas telecommunications markets by ACSI or any other entity. Hence, the Commission does not have authority under Section 253(d) to preempt the interconnection provisions of the Arkansas Act.

The Commission should also recognize Section (2)(b) of the Communications Act precludes the preemption sought by ACSI. In interpreting Section 2(b), the Court, in Louisiana Public Service Commission v. FCC, rejected the argument that subsequent and allegedly more specific statutory sections, operate to override the broad reservation of jurisdiction in favor of the states, as set forth in Section 2(b). ACSI's arguments here similarly ignore this fact, and should be rejected.

Finally, the Commission should find the Tenth Amendment to the U.S. Constitution precludes the preemption sought by ACSI. Where, as here, there is no conflict between the 1996 Act and the Arkansas Act, the requested Commission preemption would constitute an unlawful violation of state sovereignty.

ACSI claims that the Arkansas Telecommunications Regulatory Reform Act of 1997 (Arkansas Act) "seeks to blunt the pro-competitive impact of the [Telecommunications Act of 1996 (1996 Act)] wherever possible, by directing the [Arkansas PSC] to do no more, approve no more, and permit no more than is expressly mandated by Congress and the FCC" (ACSI Petition, p. ii). ACSI relies wholly upon its perception of the "intent" of the Arkansas Act, and fails to cite a single Arkansas statutory provision, rule or order that is inconsistent with the 1996 Act or the Commission's implementing rules. Nonetheless, ACSI asks the Commission

to take the extraordinary step of preempting the Arkansas General Assembly and the Arkansas PSC, and of supplanting the Arkansas PSC in all or virtually all implementation proceedings.

Before expending its time and effort on ACSI's request that it ride roughshod over Arkansas sovereignty, the Commission should ask a very simple and basic question: **WHERE IS THE CONFLICT?** NATCO submits that the Arkansas Act neither conflicts, nor is otherwise inconsistent, with the 1996 Act. Rather, the Arkansas Act's numerous references to the "Federal Act" make it clear that the Arkansas PSC must review interconnection agreements, designate recipients of universal service support, and perform other duties relating to the 1996 Act in a manner consistent with that statute and the Commission regulations implementing it.

The federal-state relationship established by the Constitution and the Communications Act limits the preemption remedy to extreme circumstances where there are major and material conflicts or inconsistencies between federal and state interests. Preemption is neither lawful nor appropriate where, as here, a state complies with the mandates of federal statutes and regulations, but declines or is unable to add its own programs or requirements above and beyond the federal standards. The massive and precipitous preemption requested by ACSI should therefore be denied.

#### **Statement Of Interest**

NATCO is a family-owned, independent local exchange carrier (LEC) having its headquarters in Flippin, Arkansas (population: 1,600). It serves approximately 6,900 access lines in the Ozark Mountain area of rural northcentral Arkansas. It was founded in 1951, and now has six exchanges spread over a 658 square mile area among the mountains, valleys and waterways of three Arkansas counties (Marion, Boone and Carroll).

NATCO is an Arkansas LEC subject to the jurisdiction of the Arkansas PSC.

**The Arkansas Act Is Consistent  
With The Provisions Of The 1996 Act Regarding  
Arbitration And Approval Of Interconnection Agreements**

ACSI complains that the Arkansas Act "limits the options available to the Arkansas PSC in considering and imposing interconnection requirements **above and beyond** [emphasis added] those established by the 1996 Act and the FCC's Local Competition Order." (ACSI Petition, p. 3). However, ACSI's desire for a deal better than that mandated by federal law is not an appropriate basis for federal preemption.

ACSI's "examples" of Arkansas Act provisions "directly contrary to the federal objectives for local inter-connection articulated in the 1996 Act" (Id. at p. 5) highlight instead the consistency between the state and federal statutes. For example:

- (1) The second sentence of Section 9(i) of the Arkansas Act prohibits the Arkansas PSC from imposing "any inter-connection requirements that **go beyond** those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act [emphasis added]." The provision is consistent on its face with the 1996 Act, and permits Arkansas PSC regulation to evolve in conjunction with the Commission's interconnection rules.
- (2) Section 9(d) of the Arkansas Act states that "Except to the extent required by the Federal Act and this Act," the Arkansas PSC shall not require an incumbent LEC "to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements" to a competing LEC. Although ACSI attempts to minimize the significance of the "Federal Act" clause by placing it at the end of its example, the clause actually appears at the beginning of Section 9(d) where it expressly requires the Arkansas PSC's rulings to be consistent with the 1996 Act.
- (3) Section 9(h) of the Arkansas Act requires incumbent LECs to provide CLECs with nondiscriminatory access to operator services, directory listings, and 911 service "only to the extent required in the Federal Act." Again, the "Federal Act" clause requires incumbent LECs to furnish these services in a manner consistent with their obligations under the 1996 Act.
- (4) The first sentence of Section 9(i) of the Arkansas Act requires the Arkansas PSC to approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act, unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act. This provision is consistent with Section 252(e)(2)(B) regarding the standards for state commission approval of arbitrated agreements, and offers added protection (above and beyond the federal requirements) for CLECs entering into negotiated and mediated agreements.
- (5) Section 9(j) of the Arkansas Act limits the parties to an arbitration proceeding

under Section 252 of the Federal Act to the persons or entities negotiating the agreement. This is consistent with Section 252(b), which mandates arbitration only for the parties to a negotiation. The discrimination protection for non-parties referenced by ACSI (ACSI Petition, p. 5) is found in Section 252(e)(2)(A), and applies only to negotiated (i.e., non-arbitrated) agreements.

These ACSI-selected examples make it abundantly clear that the Arkansas Act has not constructively abolished the Arkansas PSC, nor precluded it from arbitrating and approving interconnection agreements which comply with the 1996 Act. Rather, Section 9 of the Arkansas Act expressly and repeatedly orders the Arkansas PSC to review and arbitrate interconnection disputes in accordance with the national standards established by the 1996 Act and the Commission's Rules.

In its Local Competition Order<sup>1</sup> at para. 54, the Commission stated that it was adopting national standards for interconnection, resale and unbundled network elements under Section 251, and that it was **permitting** states to go beyond these national standards to impose additional requirements consistent with the 1996 Act and its implementing rules. In other words, the Commission left the matter of whether to go beyond national standards on unbundling, resale and interconnection, within the discretion of the states. The Commission asserted that national (as opposed to state) rules more directly and effectively address the competitive goals and economic circumstances of the telecommunications industry. It concluded that national standards would: (a) expedite negotiations and state commission arbitrations; (b) simplify the statement of terms to be included in all arbitrated agreements; (c) facilitate entry decisions by increasing the efficiency and predictability of negotiations and arbitrations; (d) reduce the need for new entrants to design costly multiple network configurations and marketing strategies; and (e) reduce administrative burdens and litigation by minimizing the need for competitors to revisit the same issue in 51 different jurisdictions. Id. at para. 56.

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<sup>1</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (1996) ("Local Competition Order").

The Arkansas General Assembly has now exercised the discretion left to it, and has elected to require the Arkansas PSC to arbitrate and approve interconnection agreements in accordance with the national rules established by the 1996 Act and the Commission's regulations. At least for now, it has determined not to allow the Arkansas PSC to go beyond these national standards by adopting additional intrastate rules. Particularly in light of the numerous and significant advantages asserted by the Commission with respect to uniform national rules, this decision constitutes a reasonable exercise of the Arkansas legislature's discretion and ought not subject Arkansas to federal preemption.

**The Arkansas Act Is Consistent With  
The Provisions Of The 1996 Act Regarding  
Qualification For Universal Service Support**

ACSI claims that the Arkansas Act disqualifies it and other CLECs from qualifying as "eligible telecommunications carriers (ETCs)" and receiving funding from the Arkansas Universal Service Fund (Arkansas USF) (ACSI Petition, p. 18). Again, ACSI's own selected examples highlight instead the consistency between the Arkansas USF and the future federal USF:

- (1) Section 5(b) of the Arkansas Act requires the Arkansas PSC to designate other telecommunications providers as eligible for Arkansas USF support in non-rural areas in a manner "consistent with Section 214(e)(2) of the Federal Act." Section 5(b)(1) includes as a condition of such designation that the "other telecommunications provider accepts the responsibility to provide service to all customers in an incumbent [LEC's] local exchange area using its own facilities or a combination of its own facilities and resale of another carrier's services." Section 5(b)(1) provides further that Arkansas USF support will not begin "until the telecommunications provider has facilities in place and offers to serve all customers in its service area." This provision is wholly consistent with Section 214(e)(1) from the 1996 Act, which expressly requires a carrier seeking designation as an ETC to offer the federally supported services and to advertise the availability of such services "throughout the service area for which the designation is received." ACSI seeks to create the appearance of a conflict by quoting the "advertising" clause out of context, and implying that mere advertising of the availability of services (without the intent of actually offering to serve all customers) is sufficient. However, a proper reading of Section 214(e)(1) requires an ETC to offer **and** advertise the supported services **throughout** the service area. Also contrary to ACSI's reading, Section 5(b)(1) does not "disqualify all CLECs that cannot replicate the incumbent LEC's comprehensive networks or serve most residential customers economically" (ACSI Petition, p. 17). Rather, Section 5(b)(1) expressly permits Arkansas

ETCs to provide service via a combination of their own facilities and resold services.

- (2) Section 5(b)(2) of the Arkansas Act states that a telecommunications provider may only receive Arkansas USF funding "for the portion of its facilities that it owns and maintains." ACSI's attempt to create a conflict between this provision and Section 214(e)(1)(A) of the Federal Act misses the critical distinction between the distribution of universal service support (to which Section 5(b)(1) applies) and the determination of eligibility for universal service support (to which Section 214(e)(1)(A) applies). Whereas both federal and Arkansas USF recipients may qualify for USF support by offering the requisite services via their own facilities and resale, it is perfectly consistent for Arkansas to calculate and distribute intrastate USF support on the basis of the cost of the recipient's own facilities. This avoids duplicative support for wholesalers and resellers of the same underlying facilities, and ensures that Arkansas USF dollars promote infrastructure development to the maximum possible extent. This Arkansas policy is fully consistent with the policy of Section 254(e) that carriers receiving federal USF support "use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."
- (3) Section 5(b)(5) of the Arkansas Act conditions designation of an ETC upon the determination "that the designation is in the public interest." Contrary to ACSI's characterization, state commissions are not forbidden from requiring separate public interest determinations regarding ETCs in non-rural areas. Rather, Section 214(e)(2) of the Federal Act expressly provides that state commissions may (in rural LEC service areas) and shall (in other areas) designate ETCs "[u]pon request and consistent with the public interest, convenience, and necessity."

Section 254(f) of the Federal Act expressly permits a state to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." ACSI's own examples demonstrate that the Arkansas Act's intrastate universal service provisions not only are "not inconsistent" with the 1996 Act, but also, from a more positive standpoint, are quite consistent and congruent with it.

### **The Legal Prerequisites For Preemption Are Not Satisfied**

In Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369 (1986), the Court stated that Congress, as well as federal agencies acting within the scope of congressionally-delegated authority, may preempt state regulation only under the following circumstances:

- (a) Congress, in enacting a federal statute, expresses a clear intent to preempt state law, Jones v. Rath Packing Co., 430 U.S. 519 (1977);
- (b) when there is outright or actual conflict between federal and state law, Free v.

Bland, 369 U.S. 663 (1962);

- (c) where compliance with both federal and state law is, in effect, physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963);
- (d) where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983);
- (e) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); or
- (f) where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, Hines v. Davidowitz, 312 U.S. 52 (1941).

None of these circumstances are applicable to ACSI's petition.

First, Congress, in enacting Sections 251, 252, 254 and 214(e) in the 1996 Act, has expressed no intent to preempt state law. To the contrary, Congress has expressly and repeatedly assigned responsibility for the implementation and enforcement of interconnection and universal service provisions to the states. See, e.g., 47 U.S.C. §§ 251(f), 252(b), 252(d), 254(f) and 214(e).

Second, there is no outright or actual conflict between federal and state law. As detailed above, the provisions of Sections 5 and 9 of the Arkansas Act proffered by ACSI as examples of "conflict" are wholly consistent with Sections 251, 252, 254 and 214(e) of the 1996 Act. In fact, the explicit and repeated references in the Arkansas Act to the 1996 Act - - for example, "system of regulation ... consistent with the Federal Act" (Arkansas Act, Sec. 2); "consistent with Section 214(e)(2) of the Federal Act (Id. at Sec. 5(b)); "[e]xcept to the extent required by the Federal Act" (Id. at Sec. 9(d)); "[a]s provided in Sections 251 and 252 of the Federal Act" (Id. at Sec. 9(f)); and "as permitted by the Federal Act" (Id. at Sec. 9(g)) - - reflect the obvious intent of the Arkansas General Assembly to achieve consistency with the 1996 Act, not create conflicts with it.

Third, compliance with both the 1996 Act and the Arkansas Act is not only physically possible, but also relatively easy. The Arkansas Act adopts the national standards set forth in

the 1996 Act and the Commission's rules for the arbitration and approval of interconnection agreements, and for the designation of qualified universal service support recipients. In addition to achieving the uniformity benefits listed by the Commission in paragraphs 55 and 56 of its Local Competition Order, the Arkansas Act's reliance upon federal standards simplifies compliance with federal and state law.

Fourth, there is implicit in the 1996 Act no barrier to state regulation, nor any attempt by Congress to legislate comprehensively and leave no room for the states. Indeed, as detailed above, Congress has expressly and repeatedly assigned responsibility for the implementation and enforcement of interconnection and universal service provisions to the states.

Finally, the Arkansas Act does not stand as an obstacle to the accomplishment and execution of the full objectives of Congress. Rather, it is expressly designed and worded to be consistent with the 1996 Act. ACSI's complaint is not that the Arkansas Act conflicts with the 1996 Act, but rather that Arkansas thus far has exercised its discretion to stay within the parameters of the federal requirements (ACSI Petition, pp. ii, 3).

**Section 252(e)(5) of the 1996 Act  
Does Not Authorize The Broad Preemption Sought By ACSI**

Section 252(e)(5) of the 1996 Act does not explicitly or implicitly authorize the Commission to seize from the Arkansas PSC jurisdiction over the arbitration and approval of all future interconnection agreements, or the designation of all future eligible recipients of federal or state universal service support.

Contrary to ACSI's interpretation, Section 252(e)(5) is a very narrow provision which applies, on a case-by-case basis, solely to **individual** state commission proceedings regarding the consideration and approval of interconnection agreements. Section 252(e) is worded throughout exclusively in terms of the review of "an agreement" or "the agreement." Section 252(e)(5) itself expressly states that if a state commission fails to carry out its responsibility "in any proceeding," then the Commission may issue an order preempting the state commission's jurisdiction "of that proceeding" and shall assume the responsibility of the state commission

"with respect to the proceeding."

The plain language of Section 252(e)(5), whether read by itself or in the context of the entire Section 252(e), leaves no doubt but that Congress intended to limit the Commission's Section 252 preemption power to **individual** state commission proceedings regarding the arbitration and approval of interconnection agreements. It contains absolutely no authorization for the requested Commission seizure of jurisdiction over all future Arkansas interconnection proceedings, and has no applicability whatsoever to questions of eligibility to receive universal service support.

**Section 253(d) of the 1996 Act  
Does Not Authorize The Preemption Sought By ACSI**

Section 253(d) authorizes the Commission to preempt state or local "legal requirements" that prohibit, or have the effect of prohibiting, any entity from providing telecommunications services. As indicated by the caption of Section 253, these legal requirements are commonly known as barriers to entry. They include certification, licensing, franchising and similar legal requirements that exclude or preclude entities from entering markets which they otherwise possessed the economic and technical capability to serve. See, e.g., Classic Telephone, Inc., 4 CR 1062 (1996).

The Arkansas General Assembly's determination that the Arkansas PSC shall arbitrate and approve interconnection agreements in accordance with federal law, but not impose additional state requirements upon incumbent LECs, is not a "legal requirement" barring entry into Arkansas telecommunications markets by ACSI or any other entity. Hence, the Commission has no more authority under Section 253(d) to preempt the interconnection provisions of the Arkansas Act, than it does to preempt a state tax, employment, or environmental law that might make it somewhat more difficult or expensive than an entity desires to enter a particular telecommunications market.

Likewise, the non-designation of an entity as eligible to receive universal service support is not a legal "barrier to entry" in most telecommunications markets. In rural markets where

non-designation can become more significant, Section 253(f) of the 1996 Act expressly removed from the definition of "barrier to entry" state requirements that entities obtain designation as an ETC as a pre-condition for entry into certain rural markets.

Hence, Section 253(d) authorizes the Commission only to strike down certain state and local laws barring entry into telecommunications markets. It is wholly devoid of authority for the Commission to assume the role and responsibilities of a state commission, as requested by ACSI.

**Section 2(b) of the Communications Act  
Precludes The Preemption Sought By ACSI**

Section 2(b) of the Communications Act declares that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. §152(b).

In Louisiana Public Service Commission v. FCC, *supra*, the Court stressed that Section 2(b) expressly places jurisdictional limitations on the Commission's power. It held that Section 2(b) "fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate communication service." *Id.* at 370.

In Louisiana Public Service Commission, the Court was required to construe Section 2(b) in conjunction with Section 220, a subsequently enacted provision which gave the Commission broad authority to prescribe the depreciation practices of telecommunications carriers. In doing so, the Court rejected the arguments of the Commission that: (a) the subsequent and more specific Section 220 conferred exclusive regulatory power over depreciation upon the Commission and manifested a clear intent to displace state depreciation law, *Id.* at 376-379; and (b) the refusal of the states to accept the Commission's depreciation requirements would frustrate the federal policy of increasing competition in the industry. *Id.*

Instead, the Court employed the rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict. *See Washington Market Co. v. Hoffman*,

101 U.S. 112 (1879). It gave considerable attention to Section 2(b)'s limitation of the Commission's jurisdiction, and refused to allow the subsequent and allegedly more specific Section 220 to be employed to preempt state regulation of depreciation. Rather, it held that Section 2(b) barred federal preemption of state regulation over the depreciation of dual jurisdiction property for intrastate rulemaking purposes.

Here as well, Congress did not repeal Section 2(b) in connection with the 1996 Act, nor did it indicate that Sections 251, 252, 254 and/or 214(e) superseded or overrode Section 2(b) under any specified circumstances. Rather, the numerous implementation and enforcement responsibilities assigned to the states by the 1996 Act indicate that Congress intended to preserve the dual federal-state jurisdiction, under which the telecommunications industry has been regulated for more than 60 years.

In light of the continued viability of the jurisdictional limitations of Section 2(b), the Commission has no authority to preempt and replace a state commission in the manner that ACSI requests it to supplant the Arkansas PSC.

**The Tenth Amendment To The U.S. Constitution  
Precludes The Preemption Sought By ACSI**

Preemption of the Arkansas Act and replacement of the Arkansas PSC further would constitute an impermissible infringement on state sovereignty in violation of the Tenth Amendment to the United States Constitution.

The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It preserves and protects the sovereignty of Arkansas to establish and operate its own government, including the right of the Arkansas legislature to specify the power and authority of the Arkansas PSC. Where, as here, there is no conflict between the 1996 Act and the Arkansas Act, the requested Commission preemption and replacement of the Arkansas PSC would constitute an unlawful violation of state sovereignty.

In New York v. United States, 505 U.S. 144 (1992), the Court held that Congress may

not commandeer the legislative processes of the states by compelling them to enact and enforce a federal regulatory program. While Congress has substantial powers to govern the nation, the Constitution has never conferred upon it the ability to require the states to govern according to Congress' instructions. See Coyle v. Smith, 221 U.S. 559, 565 (1911). Indeed, the Court recognized that the question of whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of debate among the framers of the Constitution. See New York, 505 U.S. at 163. It concluded that the framers opted for a Constitution in which Congress would exercise its legislative authority directly over individuals, rather than over states. Id. at 165. Thus, even where Congress has authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the states to require or prohibit those acts. See FERC v. Mississippi, 456 U.S. 742 (1982).

In Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985), the Court recognized the "special and specific position" that states occupy in the Constitutional system, and indicated that federal law should not displace state law merely on the basis of ambiguity in a federal statute.

In Gregory v. Ashcroft, 501 U.S. 452, 464 (1991), the Court found that, in order to properly preempt state authority, Congress must provide a "clear statement" of its intent to displace state authority. Likewise, it has allowed federal preemption of state law only where there is a "clear and manifest purpose" to displace state law. See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717 (1985).


Here, there is no indication in the 1996 Act or its legislative history that Congress intended to permit the Commission to displace or replace state commission jurisdiction and responsibilities in the manner requested by ACSI. The Tenth Amendment prohibits such an invasion of Arkansas sovereignty.

**CONCLUSION**

This proceeding can be readily resolved by recognizing that there is no conflict between the Arkansas Act and the 1996 Act. Both ACSI's own examples of alleged "conflict" and the repeated instructions in the Arkansas Act that the Arkansas PSC follow the "Federal Law" demonstrate that the federal and state legislation can readily be interpreted in a consistent manner. Hence, under the established legal and Constitutional principles governing the federal-state regulation of the telecommunications industry, the broad and precipitous preemption requested by ACSI must be denied.

In the absence of any clear conflict or inconsistency between the 1996 Act and the Arkansas Act, ACSI has been reduced to arguing that the Arkansas PSC must be preempted and replaced by the Commission because the Arkansas legislature has denied it authority to impose obligations **above and beyond** those required by the 1996 Act and the Commission's rules. This position -- which essentially claims that the Commission should replace the Arkansas PSC because the latter cannot take actions which federal law and regulations presently do not allow the Commission to take -- is unlawful as well as nonsensical, and should be rejected outright.

Respectfully submitted,  
**NORTHERN ARKANSAS TELEPHONE COMPANY**

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Dated: May 5, 1997

## **CERTIFICATE OF SERVICE**

**I, Cheryl R. Pannell, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 5th day of May, 1997, I caused to be delivered by hand or by U. S. Mail, a copy of the foregoing "COMMENTS OF THE NORTHERN ARKANSAS TELEPHONE COMPANY" to the following:**

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